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DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN SEATH,

Petitioner,

v.

REGULATIONS AND PERMITS ADMINISTRATION OF THE COMMONWEALTH OF PUERTO RICO

Respondent.

On Petition For A Writ Of Certiorari From The Supreme Court Of Puerto Rico

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE COURT:

Comes the respondent, the Regulations and Permits Administration, hereinafter named as RPA, through its undersigned attorneys, and respectfully prays that the Writ of Certiorari requested by Petitioner in this case be denied for lack of jurisdiction.

JUDGMENT ORDER BELOW

Review is requested as to the Judgment of June 30, 1982 of the Supreme Court of Puerto Rico. (Appendix A to the Petition of Certiorari).

COUNTER-STATEMENT OF THE FACTS

The statement of the facts as presented in the Petition for Certiorari is at times imprecise, incomplete, or both, for which reason respondent wishes to clarify some points which are highly relevant in the resolution of this case.

On February 8, 1978, RPA issued to Mr. John Seath, petitioner herein, a permit to operate a bar restaurant in the first and second floor of the building located at 150 Cristo Street, Old San Juan, Puerto Rico. Said building is owned by the Puerto Rico Industrial Development Company (PRIDCO) and leased to Petitioner, d/b/a Le Chatelet, Inc., on June 15, 1977.

The referred to building is located in the historic zone of the Old San Juan, Capital of Puerto Rico, in a sector classified as a district C-3 according to the Zoning Map of San Juan.

On June 30, 1978 Petitioner applied to RPA for a permit to operate a discotheque rather than a bar-restaurant in that same building.

On July 5, 1978 John Seath was informed by RPA that in order to continue the review of his application for a permit, he had to file before RPA: evidence as to whether the alteration or remodelation of the building was made according to a permit of RPA and, the endorsement of four public agencies mentioned in the written communication.

On September 14, 1978, pending the decision of RPA as to the permit to operate the discotheque, Petitioner opened the discotheque to the public.

Since Petitioner was operating said discotheque without the corresponding permit, on September 15, 1978, pursuant to the provisions of Section 26 of the Act Number 76 approved on June 24, 1975 (23 L.P.R.A., Sec. 72), filed an Injunction Petition before the District Court of San Juan, requesting an order directed to John Seath to cease and desist of illegally using the property as a discotheque. The TRO was issued on that same date. But upon request of John Seath, alleging that said paraly-

zation would cause him economic loss during that week-end (it was Friday), and the unemployment of at least fifteen persons, said TRO was set aside and a hearing was scheduled for September 18, 1978. The District Court allowed the intervention of a group of residents of the neighborhood that is located close to the building on which the discotheque was being operated.

A hearing took place on September 18, 1978 and an on-site inspection of the facilities was conducted on September 19, 1978, during the day hours.

On September 22, 1978 the District Court issued a Resolution and Order in the case. It concluded that in order to permanently operate a discotheque, John Seath had to obtain the necessary permit from RPA pursuant to the provisions of Section 3.02 of Planning Regulation No. 4, as amended (See page 15(a)) of the Appendix to the Petition for Certiorari of this case). Despite of that conclusion the District Court did not issue the injunction prohibiting John Seath from operating the discotheque. It reserved its jurisdiction for ulterior proceedings in the case and reverted the matter to RPA to decide as to the petition for a permit to operate the discotheque in accordance with the recommendations of said Court.

Both RPA and the intervenors, appealed the Resolution and Order of the District Court to the Superior Court of the Commonwealth of Puerto Rico, San Juan Part. RPA raised the issues that the District Court erred by invading the powers of RPA and by denying the injunction notwithstanding its conclusion that John Seath had to obtain a permit from RPA to operate the discotheque.

Since the matter regarding the concesion or denial of the use permit was reverted by the District Court to RPA for its determination, RPA acted as to that aspect of the case.

On December 15, 1978 RPA gave notice to John Seath that the permit for the operation of a discotheque had been denied because he had not submitted the favorable recommendation of

the Institute of Puerto Rican Culture for the requested building use permit, as established by Act No. 374 of May 14, 1949 as amended. (23 L.P.R.A., Sec. 161).[1] John Seath was advised that he may file an appeal before the Board of Appeals on Construction and Property, within thirty (30) days from the date of notification to its addresses, Box 41118, San Juan, Puerto Rico. (See page 23(a) of the Appendix to the Petition for Certiorari).

John Seath did not file a notice of appeal before the Board of Appeals as provided under Section 31 of the Act No. 76 of 1975, supra, (23 L.P.R.A., Sec. 72c), where a public hearing is provided to review the decisions of RPA denying a building use permit.[2] John Seath did not either file any motion or writing whatsoever before the Superior Court, where the appeal of the injunction petition was pending. Apparently, he preferred to continue the illegal operation of the discotheque without permit pending the appeal of the injunction procedure before the Superior Court.

On December 29, 1978 he filed a petition for a reconsideration of the denial of the use permit requesting a public hearing under Section 25 of Act No. 76. supra, (23 L.P.R.A., Sec. 71x). But said Section is not applicable to resolutions of RPA regarding the denial or issuance of use permits. It applies only to its orders to cease and desist and to do or not to do.

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[1] Section 1 of the Act No. 374, supra, provides, inter alia, as follows:

> "In the case of an ancient or historic zone, the Regulations and Permits Administration shall require the favorable recommendation of the Institute of Puerto Rican Culture before authorizing any building or use permit."

[2] In the Petition for Certiorari he accepts that fact when he states at page seven (7) of that Petition: ". . . John Seath did not appeal to the Appellate Board of the agency from the Administrator's decision . . ."

On May 11, 1979 RPA gave notice to John Seath that he was illegally operating a discotheque because he did not have a permit.

On June 6, 1979 John Seath filed an informative motion before RPA requesting it to stop any administrative action which may create conflict with the judicial and administrative pending action. He also filed a copy of said motion before the Superior Court where the appeal of the injunction action was pending.

On May 28, 1980 the Superior Court of Puerto Rico dismissed the appeal on the basis that the District Court's Resolution was not final and therefore not appealable. (See page 34(a) of the Appendix to the Petition for Certiorari).

On June 6, 1980 the intervenors filed a Petition for Certiorari before the Supreme Court of Puerto Rico.

On June 10, 1980 John Seath filed an Opposition to the Petition for Certiorari.

RPA did not participate in the Certiorari proceedings because it understood that since the Superior Court decided that it did not have jurisdiction in the case to review the Resolution of the District Court due to the fact that it was not final, the District Court, which retained jurisdiction in the case, was the only one that could make future determinations in the case.

On November 4, 1981 the Supreme Court of Puerto Rico issued a Resolution stating that since on September 22, 1978 the District Court denied the injunction because it was premature, that three years had elapsed from that date, and additional administrative proceedings may have taken place, which may fundamentally alter the situation on which the request for injunction was made, it was necessary to update the facts. Consequently, it ordered the District Court to set a hearing for all parties in order that they could present evidence stating the status of the litigation. It ordered the District Court to present to the Supreme Court a certification of that matter within the terms of thirty (30) days, stating ample determinations of facts

and conclusions of law as well as the award which should be granted pursuant to the new determinations, and on which said District Court reserved jurisdiction. Thereafter, the Supreme Court would issue the corresponding decision on the request for a Certiorari. (See pages 38-39 of Appendix to the Petition for Certiorari).

On December 4, 1981 the intervenors filed before the Supreme Court an informative motion accompanied by the document of December 15, 1978 on which RPA denied to John Seath the permit to operate a discotheque in the aforementioned building, and where he was advised that he could appeal to the Board of Appeals or Construction and Property within thirty (30) days from the date of its notification.

On December 22, 1981 the Supreme Court issued a Resolution transfering to the District Court the issue on whether or not the administrative action as to the use permit had concluded and, ordering the District Court to proceed pursuant to the Resolution of the Supreme Court dated November 4, 1981.

On May 27, 1982 the Supreme Court of Puerto Rico issued another Resolution ordering the District Court to report to the Supreme Court within ten (10) days after receiving the notification of said Resolution, the information requested in the Resolution of December 22, 1981.

On June 15, 1982 the District Court issued the Order included as Appendix N to the Petition for Certiorari filed before this Honorable Court. Said Order contains several facts stipulated by the parties.

Among said facts, it was stipulated that John Seath did not appeal to the Board of Appeals the denial of the use permit requested to operate the discotheque,[3] and also, that he was still operating the discotheque.

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[3] The right to appeal is provided under Section 31 of Act No. 76, supra (23 L.P.R.A., Sec. 72c(a), and John Seath was advised of that right.

On June 30, 1982 the Supreme Court of Puerto Rico issued the Judgment which is now object of the present Petition for Certiorari.

REASONS FOR DENYING THE WRIT

At the outset, it is clear that this Honorable Court lacks jurisdiction to entertain the present case because the Judgment of the Supreme Court of Puerto Rico of June 30, 1982 is not a final judgment.[4]

The jurisdiction of this Court was invoked under 28 U.S.C., Sec. 1258 (3).

Said statute states that:

> "*Final judgments or decrees* rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> (1) .....
>
> (2) .....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution,

---

[4] In addition, no federal constitutional question is involved in the present case. John Seath never had a permit to operate a discotheque, consequently the denial of the use permit for that purpose did not deprive him of any property right. On the other hand, if he understood, *arguendo*, that he was deprived of any right he could have appealed the denial of the permit to the Board of Appeals, supra, where a public hearing is provided for persons affected by a denial of a use permit. Thereafter he could have requested review of the decision of the Board of Appeals to the Superior Court.

Moreover, since the case was remanded for a final adjudication of the controversy, he will have the opportunity to raise and prove, if he can, that he has been deprived of any right.

> treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States." (Emphasis added).

Since 28 U.S.C., Sec. 1258 permits this Honorable Court to review only final judgments or decrees of the Supreme Court of Puerto Rico, it is proper to analyze the Judgment of said Court which is the object of the Petition for Certiorari, to determine if it is or not a final judgment.

The Judgment of the Supreme Court of Puerto Rico reads as follows:

> "Considering as firm the administrative decision of the Regulations and Permits Administration (Dec. 15, 1978) that denied a use permit requested by Petitioner-Respondent Seath to operate the discotheque (night club) "San Juan San Juan"; and that from the updated statement of facts as of June 15, 1982, submitted by District Judge, Mr. Brocco Oliveras, it appears that the restaurant business closed but the discotheque that was presented as a dependency of the former continues to operate, and that four years after the District Court's judgment (Sept. 22, 1978) the conditioned use permit has not been granted by RPA, a possibility that then stayed a concrete adjudication of the injunction petition prohibiting the discotheque operation, to which end the District Court retained jurisdiction for procedural warranted action.
>
> We annul the Superior Court (May 28, 1980) judgment on review *and remand the case to the District Court for final adjudication of the controversy according to the present status of facts.*" (Emphasis added)

From a glimpse of the above cited judgment it can be appreciated that it is not a final judgment because it does not finally decide the central controversy in the case. On the contrary, the Supreme Court of Puerto Rico remands the case to the District Court for the final decision of the real controversy, namely whether or not it is proper to issue a permanent injunction prohibiting the discotheque operation under the status of

facts (not considered by the District Court when it originally retained jurisdiction for ulterior proceedings in the case).

The fundamental question with respect to when a judgment is final is whether it can be said that there is nothing more to be decided. *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981).

In the case of *San Diego*, supra, this Honorable Court stated that:

> ". . . The logical course of action for an appellate court that finds unresolved factual disputes in the record is to remand the case for the resolution of those disputes. We therefore conclude that the Court of Appeals decision contemplates further proceedings in the trial court." 450 U.S. at 632.

There are very few circumstances in which a judgment has been considered as a final judgment when there are further proceedings in a lower court to come, as analyzed in the case of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But the judgment in those circumstances shall be plainly final on a federal issue. The circumstances in the present case are very far from being under any of those exceptions, since no federal issue has been decided neither by the Supreme Court of Puerto Rico nor by the lower court in this case.

The present case only presents a matter of local law. And it has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous," *Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado*, 303 F.2d 645 (1962); *Acosta-Marrero* v. *Commonwealth of Puerto Rico*, 275 F.2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board*, 257 F.2d 355 (1958); *Marquez* v. *Aviles*, 252 F.2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of Puerto Rico*, 220 F.2d 651 (1955); *Sagastivelza* v. *P.R. Ins.*, 171 F.2d 563 (1949); *Compose* v.

Central Cambalache, Inc., 157 F.2d 43 (1946). See also *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970).

CONCLUSION

Inasmuch as the Judgment of the Supreme Court of Puerto Rico is not a final judgment, and since the present case only presents a matter of local law, we respectfully understand that the writ of certiorari should be denied.

Respectfully submitted.

San Juan, Puerto Rico, this 16th day of December, 1982.

Respectfully submitted,

MIGUEL PAGAN
Acting Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on this same date three printed copies of the foregoing Opposition to the Petition for a Writ of Certiorari have been served, by certified mail to Maria Milagros Soto, Esq., Counsel for Petitioner, at her address: Banco Central y Economias, Office 1115, Hato Rey, Puerto Rico, 00917.

San Juan, Puerto Rico, this 16th day of December, 1982.

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